

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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DAVID BOWERS,

Petitioner,

v.

Case No. 08-C-285

JOHN HUSZ, et al.,

Respondent.

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**ORDER**

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David Bowers has filed a notice of appeal of this court's dismissal of his habeas petition. I dismissed the petition pursuant to Rule 4 of the Rules Governing § 2254 Proceedings on the grounds that Bowers had failed to fairly present his arguments to the state courts. Before a habeas petitioner may take an appeal to the Seventh Circuit, I must consider whether to grant him a certificate of appealability ("COA"). 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). The certificate of appealability may issue only if the applicant makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To do so, the appellant must demonstrate that reasonable jurists could debate whether this challenge in her habeas petition should have been resolved in a different manner or that the issue presented was adequate to deserve encouragement to proceed further. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

In a request for reconsideration, Bowers suggests he is currently being denied law books and other pertinent materials. But that is not an excuse for his failure to present the issues in question to the state courts. The fact is that he has never done so, and any current difficulties he might be

having (a notion undercut by his ability to present his claims here without any trouble) do not explain why he has not pursued his claims first in the state courts, as required by 28 U.S.C. § 2254(b)(1)(A).

Accordingly, my conclusions about Bowers' petition do not suggest that the resolution of the petition falls into the category of "debatable." As such, the certificate of appealability is therefore **DENIED**.

Bowers proceeded *in forma pauperis* in this court. Presumably he also wishes to proceed in the court of appeals without paying the appellate filing fee, and so I construe his filings as a request to proceed in that capacity. Although I have concluded that the COA should not issue, I do not find that the appeal is taken in bad faith. 28 U.S.C. § 1915(a)(3). Bad faith is a lower standard than that considered in the request for a COA, and I do not find the appeal so meritless that pursuing it constitutes bad faith. *Walker v. O'Brien*, 216 F.3d 626, 631-32 (7th Cir. 2000). Accordingly, leave to proceed *in forma pauperis* on appeal is **GRANTED**.

**SO ORDERED** this 12th day of June, 2008.

s/ William C. Griesbach  
William C. Griesbach  
United States District Judge